



INTERIOR BOARD OF INDIAN APPEALS

Villa Vallerto v. Mildred L.P. Patencio

2 IBIA 140 (01/16/ 1974)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF

VILLA VALLERTO

v.

MILDRED L. P. PATENCIO

IBIA 74-17-A

Decided January 16, 1974

Appeal from an administrative decision canceling long-term business lease.

Affirmed.

Indian Lands: Leases and Permits: Long-term Business: Cancellation

Where a long-term business lease approved by the Secretary, was negotiated by an Indian lessor, and where the lease includes the provision “* * * Lessor, at the sole option of the Lessor, may terminate this lease * * *” such lease may be canceled by the Secretary on behalf of the lessor upon lessor’s demand where the default is undisputed and the breach of covenant is material.

APPEARANCES: Donald N. Belveal, Attorney at Law, Newport Beach, California, for Villa Vallerto, a limited partnership and Howard T. Lane, general partner, appellant; Raymond C. Simpson, Attorney at Law, Long Beach, California, for Mildred L. P. Patencio, lessor; William M. Wirtz, Attorney at Law, Interior's Office of the Solicitor, Sacramento, California, for the Area Director and the Director of the Palm Springs Office of the Bureau of Indian Affairs, appellees.

OPINION BY MR. McKEE

This is an appeal from the Sacramento Area Director's June 25, 1973, order canceling lease PSL 139, Contract No. J53C14201756 covering a portion of Palm Springs, Al. No. 55, Mildred L. P. Patencio, lessor.

NOTICE IS HEREBY GIVEN: That a notice of appeal dated July 3, 1973, was timely filed by Villa Vallerto, a California limited partnership lessee, and the said appeal is hereby docketed under the above number.

By special delegation of authority this appeal addressed to the Area Director of the Sacramento Office of the Bureau of Indian Affairs, was transferred on September 14, 1973, by the Assistant Secretary of

Interior to the Director, Office of Hearings and Appeals, for final determination. A copy of the delegation is attached as "Appendix A." A further general delegation of authority was issued August 6, 1973, by the Director to the Board of Indian Appeals as an ad hoc Board, attached as "Appendix B."

The Area Director's memorandum on appeal dated August 27, 1973, addressed to the Commissioner of the Bureau of Indian Affairs, is a part of the record transferred to the Board. Attached thereto is a copy of lease PSL-139 with amendments, and supplements. The Area Director's memorandum with 28 attached documents duly itemized constitutes the record in this matter.

The appeal involves the cancellation of a lease having a term of 65 years covering a portion of Palm Springs Allotment No. 55 held in trust by the United States for Mildred L. P. Patencio, an enrolled member of the Agua Caliente Band of Mission Indians. As is hereinafter discussed, the effective date of said lease is fixed as September 3, 1971. The lease consisting of a composite of several documents was approved by the Area Director of the Bureau of Indian Affairs under authority delegated by the Secretary of the Interior pursuant to the requirements of 25 CFR Part 131, with noted exceptions.

Beginning shortly after the end of the first year of the lease,

successive notices of default were issued to the lessee by the Area Director at the request of the lessor. By registered letter of December 21, 1972, the Area Director gave notice of default in performance of several provisions of the lease and specifically called attention to an impending default in performance of item 5 of the lease. A period of 30 days was allowed pursuant to 25 CFR 131.14 in which “* * * to cure the claimed default in rental payment and 60 days in which to correct all other violations.” The 60-day period ended February 19, 1973.

Negotiations were undertaken to modify the terms of the lease to cure the defaults, but with the passage of time new defaults occurred. No new agreement was reached and there was no waiver of any default.

By registered mail notice of June 25, 1973, the Area Director canceled the lease upon the demand of the Indian lessor.

Item 5 of the lease entitled “Plans and Designs,” as modified by Supplemental Agreement No. 1 dated July 30, 1971, required the appellant, lessee to submit plans within “* * * One hundred eighty (180) days from the date of this approval, * * *” and provided that, “* * * said lease shall therefore become effective upon the date that Lessee signs the conditional approval of said lease which has been attached thereto and made a part thereof * * *.”

(Emphasis

supplied.) The separate document attached, entitled "Approval of Supplemental Agreement No. 1," executed by the lessee acting by "Howard T. Lane, General Partner" is undated.

However, the Area Director approved it on September 3, 1971, and Mr. Lane, acting for the lessee acknowledged his signature before a notary public on September 17, 1971. It could be argued that September 17th should thus be considered the date "* * * that lessee signs * * *," and, therefore, the effective date of the lease. This would be true were it not for the statement made by appellant on pages 5 and 6 of its brief contending that the date of the Secretary's approval on September 3, 1971, is the effective date.

A finding is made that all of the signed documents taken together constitute a single contract having the effective date of September 3, 1971. The Area Director's contentions for the date of August 3, 1971, cannot be sustained.

The lessee admits that it did not comply with the provision in item 5, as amended, of the lease requiring the submission within 180 days after September 3, 1971, of a "preliminary general plan and design" for the development of three and one-half of the seven acres of the premises leased. By calculation the period ended at midnight on March 1, 1972, and default in performance of item 5 beginning March 2, 1972, has continued ever since. No tender of

compliance has been offered, and none of the other requirements of item 5 has been met.

Lacking compliance with item 5, there could be no compliance with item 6 requiring the completion of improvements having a value of four hundred thousand dollars (\$400,000) within one year of approval of the “general plan.” Item 6 further includes the following provision, “* * * Lessor, at the sole option of the Lessor, may terminate this lease unless failure to complete said improvements is beyond the control of the Lessee.” The lessee has not alleged compliance or averred that its failure to comply arose from a circumstance beyond its control.

The provision for cancellation in this lease is sufficient to distinguish it from the lease under consideration by the court in Sessions, Inc. v. Rogers C. B. Morton, Secretary of Interior et al., 348 F. Supp. 694 (1972), which has no such provision. The court ruled there that since the Secretary was a party to the lease (he had approved the lease pursuant to 25 CFR 131.5(a)), he could not act unilaterally to effect its cancellation and that cancellation was subject only to the order of the court.

In the lease contract before us, the lessee agreed with the lessor in a bilateral contract that the discretion to cancel (albeit

for cause) rested exclusively with the lessor. However, the Secretary in his trustee relationship to lessor exercised discretion in approving the lease in the first instance and again in ordering cancellation thereof for default. In the exercise of discretion, the Secretary was not bound to issue a cancellation decision upon a frivolous demand by the lessor, but upon demand made to do so for good cause, he had no choice other than to comply. The record of default in performance by the lessee is clear and no unresolved material issue of fact requiring a hearing is presented.

A finding is made that on June 25, 1973, the appellant was in default in performance of the lease requirements set forth in both items 5 and 6, and that such default constituted a breach of material provisions of the lease.

A further finding is made that item 6 of the lease specifically reserved to the lessor the sole option to terminate the lease upon failure of lessee to perform its covenants.

Based upon such findings, a conclusion is reached that the Area Director acted in behalf of the lessor within his authority in the issuance of his decision canceling lease No. PSL-139 on June 25, 1973. The Area Director's decision should be affirmed.

Upon the finding that the provisions of the various documents taken together constitute one lease contract, which was terminated by cancellation, it is concluded that the provision therein giving the lessee an option to purchase was terminated. The lessee had no further right remaining after issuance of the Area Director's order of cancellation.

A finding is made, upon the establishment of September 3, 1971, as the effective date of the lease, that the record of rental payments is not sufficiently clear to support a finding of default in payment of rental. There is no apparent dispute between the parties as to the amount of the payments which have actually been made. The only dispute is as to the application of the payments. The rental due between September 3, 1971, and the June 25, 1973, cancellation, can be calculated. The deficiency, if any, can be determined and collected from the lessee's cash bond.

The record is also deficient in that it omits any specification of alleged default in the payment of taxes, and no finding of default is made here.

The Indian lessor has at all times refused to consent to the suspension of the cancellation pending disposition of this appeal.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and by Appendixes "A" and "B" hereto, it is ORDERED that the action of the Area Director in canceling the lease is affirmed.

IT IS FURTHER ORDERED that the lessor was and is entitled to immediate possession of the leasehold.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
David J. McKee, Chariman

We concur:

//original signed
Alexander H. Wilson, Member

//original signed
Michell J. Sabagh, Member



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Appendix A

Memorandum

To: Director, Office of Hearings and Appeals

From: For the Assistant to the Secretary of the Interior //original signed

Subject: Appeal by Villa Vallerto from the Sacramento Area Director's Cancellation of Palm Springs Lease No. 139

Enclosed for handling by your office is the case file in the subject matter as submitted by the Area Director's letter of August 27, 1973. The lease was cancelled for cause on June 25, 1973.

It is noted that the Area Director recommends that the lease cancellation be suspended during the pendency of the appeal. If this is done, it appears that such action would restore the lessee's option to purchase under Article 38 of the lease. We are therefore, asking the Area Director to ascertain the Indian landowner's wishes in this regard and to accordingly advise your office.

Please await further word from the Area Director before acting on the proposed suspension.

Enclosures



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Appendix B

August 6, 1973

Memorandum

To: Chairman, Board of Indian Appeals

From: Director

Subject: Delegation of Authority

Pursuant to the authority of the Director, Office of Hearings and Appeals, to appoint Ad Hoc Boards of Appeal, 43 CFR 4.1 (5), the Board of Indian Appeals is hereby authorized to consider and rule upon appeals from decisions of officials of the Bureau of Indian Affairs and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the issues. This ad hoc authority shall remain in force and effect until the Board's authority to hear such appeals is published in the Federal Register.

//original signed
James M. Day